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NO. 881

In The

SUPREME COURT OF THE UNITED STATES

(October Term, 1968)

DAYTON FOOD FAIR STORES, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable The Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed and granted enforcement to part of an order of the National Labor Relations Board. In this behalf Petitioner shows unto this Court:

OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto as Appendix A. The order and opinion of the National Labor Re-

lations Board is reported as 165 NLRB No. 12 and is attached hereto as Appendix B. That part of the trial examiner's decision applicable to the issues herein is attached hereto as Appendix C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Court of Appeals ordered enforcement of the National Labor Relations Board order on August 2, 1968. Petition for Rehearing filed by petitioner was denied by order of the Court on October 3, 1968.

The statutory provisions believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari are Section 1254 of Title 28 U.S.C.A., which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari and Section 10 (c) of the National Labor Relations Act, which provides that judgments of the Court of Appeals with respect to unfair labor practice cases shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

In this cause the petitioner claimed rights under Amendment I of the Bill of Rights, United States Constitution and under Section 8 (c) of the National Labor Relations Act, and argues that the Court below and the Board misinterpreted Section 8 (a) (1), 7 and 10 (c) of the National Labor Relations Act (61 Stat. 142, 1947, 29 USC Chapter 7, Sections 151 et seq.).

QUESTIONS PRESENTED

1. Is a statement in a pre-election campaign letter that in the event of unionization and a strike called by the Union, employees may be discharged and permanently re-

placed, substantially correct and, even if ambiguous, does such a legal opinion constitute the kind of pre-election propaganda which is permissible under the National Labor Relations Act?

2. Is employer pre-election campaign literature which does not contain direct threats of reprisal or evidence of a vengeful spirit, privileged under Section 8(c) of the Act and under the First Amendment to the United States Constitution?

3. In evaluating whether an alleged misstatement by an employer in pre-election campaign literature is coercive, does the National Labor Relations Board have a duty to examine the background circumstances, including adequate opportunities for the Union to reply and for employees to evaluate the letters, lack of impact upon the election, absence of other unfair labor practices or evidence of any malicious or dishonest intent, and the context and timing of the remarks?

4. Where any coercive effects of an alleged unfair labor practice have been admittedly dissipated through the passage of time and where a rerun election has already provided a remedy for any wrongful interference with the election and where the large turnover of employees makes any notice posting meaningless, does not the Board violate the spirit of the Act by ignoring the doctrine of mootness and by forcing an employer to post an overly broad notice solely for punitive purposes?

Petitioner says the answer to these questions is, "Yes"!

STATEMENT OF THE CASE

Petitioner, Dayton Food Fair Stores, Inc. (herein called "Company" and "Employer") operated a retail food store in Trotwood, Ohio. In February of 1966 the Retail Clerks

Union, Local No. 1552 (herein called the "Union") filed a petition for a representation election with the National Labor Relations Board and began an aggressive organizational campaign among the company employees. The union held at least six meetings attended by a majority of employees and distributed at least six letters to all employees. There were home visits by pro-union adherents. The Company did not forbid discussion of union matters on its premises.

The Company distributed four letters to employees, three of which touched briefly on the subject of the rights of economic strikers.[1] The first statement was contained in a letter distributed March 29, 1966 and said:

> "If employees strike to attempt to enforce economic demands they can be permanently replaced and cannot collect any unemployment compensation."

In a sheet distributed in the store on April 7, 1966, the Company said *inter alia*:

> "Why doesn't the union play fair with you and tell you that under the law and the National Labor Relations Board decisions, if the Union calls an economic strike *every employee who leaves his or her job can be fired at once and permanently replaced.*"

In a letter mailed the same day the Company stated, *iter alia*:

> ". . . some day the union might call an economic strike to try to enforce unreasonable demands . . . and the Company can fire you and permanently replace you."

---

[1] The full text of the four letters is set forth at pp.70ja-81ja of the joint exhibit that is part of the record.

> ". . . Whom does the law allow the Company to fire and permanently replace? You know who. Not the organizers!"

Another part of the same letter stated:

> "Even if an employee would be lucky enough not to be permanently replaced during an economic strike . . ."

The representation election was held April 14, 1966. The employees voted to reject the union by a vote of 22 to 12. The Union filed objections to the election and unfair labor practice charges. An NLRB trial examiner held a hearing and issued his decision on February 14, 1967.

On May 31, 1967 The National Labor Relations Board adopted all the findings and recommendations of the Trial examiner. The Board dismissed all but two of the unfair labor practice charges, but held that the Company engaged in unfair labor practices (1) because of alleged improper remarks by employee Davis and (2) by telling employees that they "may lawfully be discharged for engaging in strike action."[2] The Board affirmed the examiner's finding of 8(a)(1) violations and ordered the Company to post a "Notice to all Employees" notifying employees, *inter alia,* that:

> "We will not tell our employees that they may lawfully be discharged for engaging in strike action.
>
> "We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join or

---

[2]The union had also charged the company with 8(a)(3) and 8(a)(5) violations. Most of the hearing and trial examiner's decision dealt with these issues. The Board dismissed the 8(a)(3) and 8(a)(5) charges and those issues were not before the Court below.

> assist any labor organization, to join Retail Clerks Union, Local No. 1552, Retail Clerks International Association, AFL-CIO to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, including strike action or other mutual aid or protection or to refrain from any or all such activities."

The Board also affirmed the Trial Examiner's recommendation that the first election be set aside and a new election be held by the Regional Director "when in his opinion the effects of the unfair labor practices found shall have been dissipated".

The Company petitioned the United States Court of Appeals for the Sixth Circuit to review the Board's orders. While the review was pending in the Court of Appeals, the Board, over the Company's objection, insisted on conducting the new election. The new election was held on September 28, 1967. The Employees again voted to reject the Union, this time by a four to one majority (24 to 6). The Court reversed the Board's order with respect to alleged improper remarks made by company employee Davis. However, the Court held that the Company's statement — "every employee who leaves his or her job can be fired at once and permanently replaced" — was an incorrect statement of law and that "the clear import of the company's letter is that if employees participated in a strike their jobs would be automatically terminated." The Court agreed with the Board's finding of an 8 (a) (1) violation and enforced the Board's order with respect to the campaign letter.

The Company subsequently filed an affidavit with the Court stating that of the 36 employees eligible to vote in the April 1966 election, only two remained on the Company's payroll as of September 15, 1968.

The Company moved for a rehearing on the ground that the posting provision of the Board's order was moot and that the notice was too broad. The Court denied the motion on October 3, 1968.

FORM IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED HERE WERE RAISED BELOW

Federal questions herein were raised in the petition in the United States Court of Appeals and in the briefs before that Court. These questions related to interpretation of Sections 8 (a) (1) and 8 (c) of the Act and Amendment I to the United States Constitution. In its Motion for Rehearing the Company raised an issue concerning the Board's remedial powers under Section 10 (c) of the Act.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Sixth Circuit below decided federal questions of substance contrary to law in that the Court in interpreting and applying the National Labor Relations Act:

a) Erroneously held that an employer may not inform employees that in the event of an economic strike they can lose their jobs and be permanently replaced.

b) Erroneously held that an honest and careless misstatement of law by an employer during a union organizational campaign constitutes a *per se* violation of Section 8 (a) (1) of the Act;

c) Erroneously refused to recognize that Section 8 (c) of the Act immunizes the employer from unfair labor prac-

tice charges resulting from speech which does not contain direct threats of reprisal or evidences a vengeful spirit.

d) Erroneously refused to consider all relevant background circumstances before ruling on whether alleged misstatements of law were "coercive" and in particular refused to consider:

(1) the absence of any other unfair labor practices.
(2) the lack of any evidence of malice.
(3) the adequate opportunity for the union to reply and correct any misstatements.
(4) the negligible impact of the statement upon the election.
(5) the timing and context of the remarks.
(6) the employees' ability to evaluate the statement.
(7) repeated employer assurances of no reprisals.

e) erroneously refused to recognize that the Board had abused its remedial powers under the Act by:

(1) refusing to accept the "rerun" election as an adequate remedy for any wrongful intereference with the election.
(2) its punitive notice posting requirement;
(3) ignoring the doctrine of mootness.

In addition the Court's judgment is unconstitutional. It affirms a denial of petitioner's right to free speech under the First Amendment of the Bill of Rights to the United States Constitution.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

THE EMPLOYER'S STATEMENTS CONCERNING THE RIGHT OF AN EMPLOYER TO TERMINATE AND REPLACE ECONOMIC STRIKERS WERE SUBSTANTIALLY CORRECT.

This Court's ruling in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) reaffirms the teaching of the *Mackay Radio Tel. Co.* doctrine – that if the employer has "legitimate and substantial justification" he may refuse to reinstate economic strikers when their positions "are occupied by workers hired as 'permanent replacements' ". *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Thus it is clear that at the moment the replacement is hired, the striker may indeed have lost his employment rights.

Cases involving employer notices in actual strike situations show that there is justification for the idea that strikers' rights are diminished even prior to the moment of replacement.

In the case of *NLRB* v. *Robinson*, 251 F. 2d 639 (CA 6) the employer said in a notice that it was taking the position that strikers "have abandoned your jobs . . . and that unless you report for work by —— you will be permanently replaced." In *Kansas Mill Co.* v. *NLRB*, 185 F. 2d 418 (CA 10) the employer wrote strikers and told them that if they did not return to work by a certain date the employer "would have no alternative than to hire new employees to take your jobs which you have vacated." These two cases, the cases of *Rubin Brothers Footwear* v. *NLRB*, 203 F. 2d 486 (CA 5) and *NLRB* v. *Bradley Wash. Fountain Co.*, 192 F. 2d 144 (CA 7, 1951) and the case of

NLRB v. *Wooster Div. of Borg-Warner Corp.*, 236 F. 2d 898 (CA 6), make it clear that in the event of a strike an employer may set a deadline when employees will be considered to have abandoned their jobs as a prelude to the hiring of replacements. These cases all support the *Wooster* doctrine that ". . . where striking employees are subject to being replaced it is not an . . . unfair labor practice to notify them that their jobs are available until a certain time, at which time replacements will be sought."

The very concept of replacement has little meaning unless it simultaneously implies a job that is open and a position that is vacant. Such a vacancy suggests that the employee has lost his job. Such a job loss has the same result and impact as a discharge.

The text writers of *CCH Labor Law Reporter* — a publication directed towards specialists and practitioners in the field of labor law comment as follows on the subject:

> "Strikers in strikes of the second type — generally called 'economic strikers' — have more limited rights, however, and are in practical effect subject to discharge." *1967 Guidebook to Labor Relations CCH, Inc. pp. 180-181*

> "The permanent replacement of strikers is technically different from their discharge but in practical effect it amounts to substantially the same thing." *CCH Labor Law Reporter,* Vol. 2, para. 4065.943.

Surely the test of whether an employer's election campaign literature contained misstatements depends on whether the misstatements are substantial rather than technical and depends upon how the words would be received by working men rather than academicians or attorneys. The technical distinction between "terminated", "fired", "replaced", "layed off" and "discharged" means very little to the average working man and is not the kind of distinc-

tion that should realistically be regarded as critical in determining whether there has been a "misstatement".

The Board itself saw nothing wrong with these words:

> ". . . when I employ new people to cross the picket line to work here . . . strikers have lost their jobs permanently." *Texas Boot Mfg. Co.,* 143 NLRB 264 (1963).
>
> "When you strike you will have lost your wages and possibly your job." *Texas Industries,* 139 NLRB 365 (1962).

The 8th Circuit Court of Appeals viewed the following remarks as permissible:

> "If the Union calls an economic strike you place your job on the line. You can be permanently replaced. You can lose your job." *NLRB* v. *Wilson Lumber Co.,* 355 F. 2d 426 (CA 8 1966).

In the case at bar the company never used the word "discharge" or "fire" without the words "permanently replace" being adjacent. The crucial point the employer sought to tell its employees was that if there was an economic strike, employees could lose their jobs. The Board's efforts to find impropriety in the statement involves a narrow reading not utilized by laymen. The employer's statement as to the law was substantially correct and at worst was a mere reversal of the proper word order. The Board's overzealous efforts to split hairs and censor typical preelection propaganda is not authorized under the Act.

II.

THE EMPLOYER'S REMARKS WERE NON-COERCIVE AND THEREFORE PRIVILEGED UNDER SECTION 8(c) OF THE ACT.

Recent lower court cases show a trend towards increased protection of an employer's right of free speech in an election campaign. The courts are correctly loathe to find employer culpability unless there is real evidence of coercive intent in the remarks.

In *Mallory & Co., Inc.* v. *NLRB,* (USCA 7), 389 F. 2d 704 the Court notes that if "the accused portions of the letters do not contain direct employer threats of reprisals" the statements must be considered in "their totality" to determine whether they contain "indirect threats".

In *NLRB* v. *Eugene Yokell,* 387 F. 2d 751 (USCA 2 1967) the Court recognized that "in classifying a particular utterance proper weight must be accorded to the First Amendment principles which underlie Section 8(c) of the Act." The Court noted the difficulty of distinguishing between threats of reprisal in the event of unionization which are prohibited and prophecies or predictions which are protected and noted that one test is "whether the employer has the power to control the occurrence of the untoward events".

In *NLRB* v. *Morris Novelty,* 378 F. 2d 1000 (CA 8 1967), the Court held that Section 8(c) of the Act "permits an employer to state his legal rights under the Act and to predict that dire economic consequences will follow from a union victory."

NLRB v. *Golub Corp.,* 388 F. 2d 921 (CA 2 1967) contains an excellent review by Judge Friendly as to the history and background of Section 8(c) and the cases interpreting the free speech problem. The Court said "while

there is a risk that an employer's prediction of adverse consequences from unionization may be taken as a threat to produce them, to hold that this danger alone suffices to convert a prediction into a threat of reprisal would go back to the very position of the early 1940's which Section 8 (c) was adopted to change." The Court went on to point out that the employer's motivation with respect to comments on the future consequences of unionization was important. To constitute a threat there must be a "threat of retaliation" – more than "a prediction that adverse consequences will develop but a threat that they will be deliberately inflicted in return for an injury – To return evil for evil". The Court in *Golub* found that the only fair reading of the letters was that the dire consequences predicted by the employer would take place "solely from economic necessity and with regret." The same spirit prevails the letters in the case at bar, where there is no hint of reprisal or vengeance in the tone of the letters but only a frank discussion of the dire consequences which could happen in the event of an economic strike called by the Union.

In the case at bar the employer is now free of any stigma of coercive conduct other than the alleged "misstatement of law" contained in the letters. The Court below ruled that this petitioner was innocent of all the other unfair labor practice charges filed by the Union. In this regard this Court's decision in *NLRB* v. *Exchange Parts Company*, 375 U.S. 405 (1964) has great relevance. In that case this Court condemned the Board's attempt to base unfair labor practice findings solely on uncoercive words unrelated to conduct. The Company's letter said "The union can't put any of these . . . (benefits) in your envelope – only the company can do that." The Court quoted Section 8 (c) and held "We place no reliance,

however, on these or other words of the respondent disassociated from its conduct."

Linn v. *Plant Guard Workers, Local 114,* 383 U.S. 53 (1966) is the latest and most important ruling of this Court on the subject of permissible speech in election cases. The court analyzed the "wide latitude" allowed to the competing parties, the fact that the Board itself "leaves to the good sense of the voters the appraisal of such matters and to opposing parties the task of correcting inaccurate and untruthful statements" quoting *Stewart-Warner Corp.,* 102 NLRB 1153 (1953). The Court noted that the Board will not interfere in the event of material misrepresentation except where the statement "has had an impact on the free choice of the employees participating in the election" *and* "where the opportunity for reply has been lacking." The Court noted that the Board tolerates "inaccurate statements" unless the party deliberately circulates "material known to be false." The Court in the *Linn* case again acknowledged "that the enactment of Section 8(c) manifests a Congressional intent to encourage free debate on issues dividing labor and management." The Court cited the *New York Times* v. *Sullivan* case, 376 U.S. 2542 (1963) for the principle that cases involving speech are to be considered "against the background of a profound commitment to the principle that debate should be uninhibited, robust, and wide open . . ."

Short of a "deliberate or reckless untruth" this Court makes it clear, that non-coercive speech is indeed privileged.

The dissenters in *Linn* also took pains to emphasize the importance of free speech in union elections. The dissenting opinion said:

> "As the majority concedes, Congress has in unmistakable terms recognized the importance of labor-management dialogue untramelled by fear of retribution for

strong utterances. It has manifested awareness that lusty speech provides a useful safety valve for the tensions which often accompany these controversies."

The Court in the *Linn* case obviously paid great respect to Dean Derek Bok's article at *78 Harvard Law Review* #1 *"Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act"*, p. 38-141, Nov. 1964. Both majority and dissenting opinions cited the article which contains a definitive analysis of "misleading" statements.

Bok's basic premise is that employees are, first of all, not likely to be swayed by misleading statements: "rarely will a misstatement be so effective as to alter the thinking of a substantial number of employees." Bok approves the Board's principle in the *Ralston Purina* case, 147 NLRB 65 (1964) that false statements will be excused "if the other party had a reasonable opportunity to reply, regardless of whether the parties were actually given the benefit of rebuttal." He recommends that "an adequate opportunity to reply will go far to remove the need for expanding controls over the content of speech." Bok concludes that ". . . it will normally be unwise to intervene unless the statements are highly material and substantially inaccurate . . . There should be a substantial likelihood, rather than a bare possibility that the outcome of the election was actually affected by the misrepresentation . . . There is little reason in theory for the law to intervene unless the misleading statement actually affected the outcome of the election."

Dean Bok notes that attempts by the Board and the Courts to limit an employer from seeking to "engender emotions" are "alien to the prevailing philosophy of the Supreme Court in matters of free speech." He stressed that "it is important to avoid discovering veiled threats

or sinister ambiguities by placing a strained interpretation on the employer's remarks" and that government should be barred from trying to curb "minor discrepancies". Bok opposes "more intricate restrictions on the content of speeches and letters" and a trend towards preoccupation with parties "who are careless rather than calculatingly dishonest".

Bok's thinking is in line with the *Hollywood Ceramics Co.* decision of the Board in 1962, 140 NLRB 221 which condemns interference with election propaganda unless the misrepresentation:

1) involves a substantial departure from the truth; *and*

2) comes at a time when the other party cannot reply; *and*

3) is reasonably expected to have a significant impact on the election:

> "The mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside."

We believe that the letters in the case at bar present at worst the kind of "ambiguities" and possible "minor distortion of some facts" which normally and "frequently occur in communication between persons," all of which even the Board in 1962 felt were not critical enough to warrant setting an election aside, much less find the employer guilty of unfair labor practices.

III.

IN EVALUATING WHETHER THE ALLEGED "MISSTATEMENT" WAS COERCIVE, THE COURT AND BOARD BOTH FAILED TO EXAMINE THE TOTALITY OF THE CIRCUMSTANCES.

In its brief before the Sixth Circuit Court of Appeals, the Board argued that the letters herein concerned "misleading statements that coerced the employees in the free exercise of their rights to engage in concerted strike activity." The Court apparently accepted this erroneous argument. In fact there was no threatened strike in the case at bar. The employer made the remarks during an election campaign. A tiny portion of the letters did discuss the rights of the employer:

1) *if* the union won the election, and
2) *if* collective bargaining was unsuccessful and did not result in a labor agreement, and
3) *if* the union called a strike
4) *if* the employees went on strike, and
5) *if* the company chose to operate during the strike, and
6) *if* the employer decided to hire replacements.

The employer recited what it conceived its legal rights to be in the event of such an "iffy" eventuality. From a practical standpoint, the possibility of a strike to the employees at Food Fair was only a vague hypothetical possibility in the dim and faraway future.

To men on a picket line, notices warning of discharge or termination may indeed have a significant impact and the courts naturally take a close look at the exact wording

of such notices. But to compare such notices with opinions and prophecies in pre-election literature is to compare apples and oranges. In the case at bar the remarks concerning the rights of strikers only covered a small portion of the totality of literature and were buried amid admittedly non-coercive materials covering other subjects.[3]

Most important the union had every opportunity to correct or refute any ambiguities in the Company's literature received by employees on April 7, 1966, a week before the election. The Union held a meeting the evening of April 7 at which a strong majority of employees (over 20 persons) attended. The statement, if it had any impact whatsoever on the employees, was fresh in their minds that evening. The Union witnesses testified that company letters were discussed and replied to by union representatives at their meetings (38Ja, 39Ja, 40Ja, 45Ja).[4] Furthermore, between April 7 and the election, the union held an additional meeting with the employees (on April 13) and mailed two letters to employees which is further evidence of the union's opportunity to reply and correct any misstatements.

In all the Union held six meetings among employees, utilized the *"Excelsior Underwear"* list of employees' names and addresses, and sponsored home visits where employees' could ask union leaders questions.

In addition, the Company imposed no restrictions on union solicitation and Union leaders had ample opportunity to discuss the letters on Company time, during working hours and at breaks.

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[3] The Trial Examiner conceded that the rest of the employer's statements fell within the "permissible scope of the free speech provision of the statute".

[4] References are to the Joint appendix, which appears in the record herein.

Of great importance is that the Union had plenty of time to reply to the Company's statements about strikers. The first Company letter that touched on the subject of "permanent replacement" was March 29, 1966 — over two weeks before the election. The alleged misstatements were made on April 7 — a full seven days before the election. The Company's last letter was devoted to a listing of company benefits and a rehash of earlier arguments and contained nothing about strikers. The Union and not the Company had the last "crack" at the employees through its meeting of April 13, the night before the election.

In the case at bar there is much evidence negating any idea that the Company was in any way vengeful towards the idea of unionism. The record is replete with testimony of employees who clearly remembered Company President Beerman's repeated verbal assertions that they should vote and act as they please without fear of reprisal. The company's last letter urged the employees to "weigh all the facts, arguments, considerations pro and con." Furthermore the Company made many assurances that if there was a Union victory the Company would bargain in good faith. A Union letter of April 12 even quoted a company spokesman's statement that in the event of a Union victory . . . "You can be sure that my client will respect that choice and sit down and bargain with you in good faith and make every reasonable effort to come to an agreement."

From all the above it is clear that:

1) The employees were told the fact that unionism would mean bargaining and not necessarily strikes and terminations in the event of strikes.

2) The Union had and utilized every opportunity to reply to the letters and any misstatements therein.

3) The employees had ample opportunity to critically evaluate the material and the Union's replies.

4) There was no company anti-solicitation rule and there was no Company effort to restrict or prevent pro-union conversation among employees.

5) The timing of the alleged misstatement many days before the election mitigates against the idea of any coercive impact.

6) The one sided vote of 22 to 12 against the Union shows that any statements had little effect on the outcome of the election.

7) There was no evidence of other circumstances or conduct which might render the words coercive in impact.

8) The employees as a group were free from any improper questioning or threats from management or unfair labor practices.

9) No one, not even the Union, ever claimed there was a program of intimidation or systematic interrogation by the Company.

10) The Company emphasized throughout the campaign that the employees were free to support the Union without fear of retribution.

11) There was not one iota of evidence showing any malice or deliberate attempt to deceive the employees. At most the author of the letters of April 7 was careless and made an honest error as to highly technical aspects of the law.

This Court has consistently criticized and rebuked the Board for not examining the totality of conduct and all the circumstances in determining whether speech is coercive. As this Court said in *NLRB* v. *Va. Electric & Power Co.*, 314 U.S. 469 (1941) "If utterances are thus to be

separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."

In the case at bar there was no express threat of reprisal or force in the event of a Union victory but only a statement of law as to hypothetical future possibilities. There was nothing intrinsically "coercive" about the words and without an examination of the background, the Board had no authority to find an unfair labor Practice under the Act as it is interpreted by this Court in light of the First Amendment to the United States Constitution.

IV.

THE COURT ERRED BY ENFORCEMENT OF THE NOTICE AND POSTING ORDER.

In *NLRB* v. *Va. Electric & Power,* 314 U.S. 469 (1941) this Court held that "The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees". This fundamental principle still governs the power of the National Labor Relations Board to fashion remedies under the Act. While one of the purposes of criminal proceedings may be punishment and retribution for the purposes of revenge or as a deterrent to other potential wrongdoers, these purposes are not applicable to the remedies under the Act which must be justified solely on the basis of whether they protect the rights of the employees of the particular employer.

In the case at bar the Board, because it felt that the "laboratory conditions" necessary for a proper election were lacking, refused to certify the results of the April 14, 1966 election and ordered a rerun election. The Board ordered that "the Regional Director hold a new election when in his opinion the effects of the unfair labor practices have been dissipated." The Regional Director held the election on

September 28, 1967. The Board's brief before the lower court concedes that circumstances at the time of this second election did "permit the free choice of a bargaining representative." Therefore, it is clear that the Board agreed that the election was held in an atmosphere in which the effects of any previous unfair labor practices had been dissipated. By ordering a new election the Board provided a sufficient remedy for any technical improprieties committed by the employer.

Furthermore, due to the rapid turnover in personnel only two of the 36 employees eligible to vote at the time of the alleged unfair labor practice in April 1966 were among petitioner's present 40 employees in September of 1968. Obviously the entire matter is now moot and any notice posting would be meaningless to the work force today and would in fact tend to disturb the climate of peaceful labor relations contrary to the major purpose of the Act.

The insistence by the Board upon such an order almost two and one-half years after the alleged unfair labor practice, when only two out of the forty employees were ever exposed to the alleged improper letters places the Board in the position of being vengeful and punitive, rather than concerned about employees' rights.

Finally, the language of the notice is too broad. It refers *inter alia* to interference with "our employees in the exercise of their right to self-organization, to form, join or assist any labor organization . . . to bargain collectively through representatives of their own choosing . . .". Such references are entirely extraneous to the narrow findings of the Court below, which are confined to employee rights in the event of a strike.

In sum, even if the employer is held to have technically violated the Act, the stigma of the finding of an unfair labor practice and expense in defending such charges

(which were all found groundless except one) are a sufficient deterrent to this employer. The absence of any objections filed with respect to the second election and the absence of any charges of misconduct against the employer since April 14, 1966, suggests that the employees' rights at Food Fair have been fully protected and that the employer's subsequent conduct has been impeccable.

The remedy of the "rerun" election, the findings of the Regional Director that the effects of unfair labor practices were dissipated, and the fact that the notice would have no remedial meaning for 95% of the present work force, are all factors which show the Board abused its discretion in insisting on the notice posting.

Finally, this Court should take a close look at the content of the notice which goes far beyond the facts of this case. This Court should make the Board adhere to Section 10(c) of the Act, which requires that only remedies which "effectuate the purposes of the Act" are permissible and should strike down efforts of the Board to be vengeful and punitive in approach.

CONCLUSION

The Court in *Thomas* v. *Collins,* 323 U.S. 516 (1945) has made it clear that employer letters in union election campaigns are "entitled to the same protection" under the First Amendment as the "espousal of any other lawful cause". Both the National Labor Relations Board and the lower courts previously have allowed latitude in employer propaganda unless there is substantial evidence of a threat of reprisal in the letter. The recent Supreme Court cases of *Linn* v. *Plant Guard Workers,* 383 U.S. 53 and *New York Times* v. *Sullivan,* 376 U.S. 254, show the

trend of this Court's thinking, and that only where a clear case of malice or a spirit of vengeance or real coercion exists, will the Court allow government agencies to shackle traditional concepts of free speech.[5]

The Sixth Circuit and the Second Circuit are in conflict as to the approach. (cf *NLRB* v. *Golub Corp.*, 388 F. 2d 921 (CA 2 1967).

The Board in the case at bar found an unfair labor practice based solely on a few ambiguous words — without any accompaning coercive conduct and without any examination of the background.

The Court's affirmance of the Board's decision and its refusal to recognize the mootness, overbreadth and punitive nature of the notice posting order is a step backward and away from the teaching of this Court.

The employer in this case, at worst, made a minor and honest error as to its opinion of the law. To find culpability destroys the intent of Congress in enacting Section 8 (c) and also runs counter to the spirit of recent decisions of this Court.

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[5] We believe that the following language of Justice Black as set forth in *Bridges* v. *California*, 314 US 292 (194) applies:

> "What finally emerges from the 'clear and present' danger cases is a working principle that the substantive evil must be extremely high before utterances can be punished".
>
> "The First Amendment does not speak equivocably. It prohibits any law 'abridging the freedom of speech or press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society will allow".

We believe that this Court intends these principles of free speech to be just as applicable to labor election cases as to other cases involving free speech.

PRAYER

For the foregoing reasons Petitioner prays that a Writ of Certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the judgment of that Court and the order of the National Labor Relations Board may be reviewed by this Court and reversed with direction that the unfair labor practice charge be dismissed or in any event that the order of the Board be modified by revising enforcement with respect to the notice posting order.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 18023

DAYTON FOOD FAIR STORES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

(Decided August 2, 1968)

(Filed August 2, 1968)

Before: Edwards, Peck and Combs, Circuit Judges.

Per Curiam: The petitioner, Dayton Food Fair Stores, Inc., seeks to have an order of the National Labor Relations Board set aside, and the Board cross-petitions for enforcement. The Board found that Food Fair violated Section 8 (a) (1) of the Act by threatening reprisals for participa-

tion in union activities and by leading employees to believe that in the event of an economic strike they could be automatically discharged.

The alleged unfair labor practices occurred during a union organization campaign at Food Fair's retail grocery store in Trotwood, Ohio. The first incident grew out of statements made by the assistant store manager, John Davis, to an employee who was active in the organizing campaign. Davis asked the employee, Ronnie Lee, how the organization campaign was going and told Lee to watch his step because the company knew of his activity. Davis later told Lee that another employee was to be fired because of that employee's union activity. There was, however, no such firing. Davis and Lee were friends and Davis was highly sympathetic to the union campaign. The tone of these remarks was not coercive, but rather they were uttered as if by one conspirator to another.

Food Fair argued that Davis was not a supervisor and, even if he was, the statements did not amount to an unfair labor practice. Under our view of the case it is unnecessary to reach the supervisor question. Assuming arguendo that Davis was a supervisor, we find that his remarks cannot be attributed to Food Fair so as to constitute a Section 8 (a) (1) violation. The remarks were made on Davis's own initiative, without the knowledge or consent of Food Fair. At most, they were hearsay evidence of the company's attitude, made by one sympathetic to the union campaign. The test in such a case would appear to be whether Lee had just cause to think Davis was acting for and on behalf of Food Fair. *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F.2d 447 (9th Cir. 1956). We find no substantial evidence or logical inference to support such a finding.

The second alleged unfair labor practice charge grew out of statements in a leaflet distributed in the store and in two campaign letters sent by Food Fair to its employees. It was stated in the leaflet and in a cover letter that, in the event of an economic strike, "every employee who leaves his or her job can be fired at once and permanently replaced."

The company's statement of the law is incorrect. While it is clear that an employer may permanently replace economic strikers, he may not fire a striking employee unless a permanent replacement has been employed. *N.L.R.B.* v. *Fleetwood Trailer Co.,* 389 U.S. 375 (1967); *Labor Board* v. *Mackay Co.,* 304 U.S. 333 (1938). Following an economic strike, employees are entitled to return to their jobs unless "legitimate and substantial business justifications" dictate otherwise. *N.L.R.B.* v. *Great Dane Trailers,* 388 U.S. 26, 34 (1967). The clear import of the company's letter is that if employees participated in a strike their jobs would be automatically terminated.

Enforcement of the Board's order is granted insofar as it applies to the campaign letter, but enforcement is denied in respect to the allegedly coercive statements of the assistant store manager, Davis.

APPENDIX B

OPINION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(CAPTION OMITTED)

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On February 14, 1967, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action. In addition, he found that Respondent had engaged in objectionable conduct prior to the election held in Case No. 9-RC-6717 and recommended that the election be set aside and a new election directed, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent did not engage in certain other unfair labor practices alleged in the complaint. The Respondent filed exceptions to the Decision and a supporting brief. The General Counsel filed limited exceptions and a brief in support thereof, and the Union joined with the General Counsel's limited exceptions to the Trial Examiner's Decision. Thereafter, Respondent filed an answering brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Dayton Food Fair Stores, Inc., Trotwood, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS FURTHER ORDERED that the election held on April 14, 1966, among Respondent's employees be, and it hereby is, set aside, and that Case No. 9-RC-6717 is hereby remanded to the Regional Director for Region 9 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 9 shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period

immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Retail Clerks Union, Local No. 1552, Retail Clerks International Association, AFL-CIO.

Dated, Washington, D. C. May 31, 1967.

.....
Frank W. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

THE PORTION OF THE DECISION OF THE TRIAL EXAMINER OF THE NLRB DEALING WITH THE SUBJECT MATTER HEREIN

There is a final objection that is supported by the evidence and a sufficient reason for setting aside the election results and holding a new one. The Company embarked upon a literature distribution campaign designed to persuade the employees to vote no. Letters and leaflets were distributed and mailed to the homes of employees. While much of what is stated there falls within the permissible scope of the free speech proviso of the statute, in its total picture the literature instills fear in the employees that selection of the Union would be a futile act and surely bring suffering in the future. Thus, again and again, the statement is repeated that in all likelihood the Union would make unreasonable demands and strike, that the employees would lose money never to be recovered, that the Company would not be obligated to agree with "any" demands that might be made—**"not even one"**—, that the Union would "spoil your life," result in "phony contracts," and such phrases. At one point, the Union is called the harbinger of "bitterness, tension, friction, headaches, uncertainty and trouble."

A leaflet distributed shortly before the election sets out in bold type a union dues checkoff form, calling for a $5.50 monthly payment, and announces, in still heavier type: "If you vote for a union, this is what you may be required to sign." And below all this, in the same leaflet, appears the prominent statement: "If you don't want to give the Union the right to demand that you be fired,

vote no." Here the Respondent grossly misled the employees as to the very point of the imminent election.

One of the leaflets twice repeats the threat that if the Union did call a strike "the Company can fire you," "Whose pay stops? Whom does the law allow the company to fire and permanently replace? You know who. Not the organizers!" And at the end, just below the election, a final bulletin again repeated emphatically the Company's prerogative not to concede any demand whatever which the Union might make and which could likely lead to strike. Toward its close this leaflet reads:

> The only recourse the Union would have if their demands were not met would be to strike. Why doesn't the Union play fair with you and tell you that under the law and National Labor Relations Board decisions, if the Union calls an economic strike *every employee who leaves his or her job can be fired at once and permanently replaced.*

This was not temperate talk in the proper exercise of the privilege to express views concerning the desirability of collective bargaining or union representation. Rather, such repeated promises of discharge to follow any attempt to exercise the right to engage in concerted activities, particularly so effectively coupled with the constant refrain equating a vote for the Union to a step toward strike, constituted a wrongful interference with the laboratory conditions necessary for the exercise of a free and untrammeled choice in the election. Accordingly, I shall recommend that the result of the election be set aside and a new one held, when, in the opinion of the Regional Director, it becomes timely.

I also find that by misleading its employees with the statements that they could lawfully be discharged in the event they should engage in a strike, the Respondent unlawfully coerced them in their free exercise of the right to

engage in concerted activities, and thereby violated Section 8 (a) (1) of the Act.

V. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above have a close intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the above findings of fact, and upon the entire record of the case, I make the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization as defined in Section 2 (5) of the Act.

3. By telling the employees they should conceal their union activities, by telling them the Company is aware of the identity of prounion employees, and by telling them they may lawfully be discharged for engaging in strike action, the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the Act, I recommend that the Respondent, Dayton Food Fair Stores, Inc., Trotwood, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from telling employees they should conceal their union activities, that the Company is aware of the identity of prounion employees, the employees may lawfully be discharged for engaging in strike action, or in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its store in Trotwood, Ohio, copies of the attached notice marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for Region 9, shall, after being duly signed by the Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respond-

[8] In the event that this Recommended Order is adopted by the Board, the words "Decision And Order" shall be substituted for the words "The Recommended Order Of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "a Decree of the United States Court of Appeals Enforcing an Order" for the words "a Decision and Order."

ent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.[9]

It is further recommended that the complaint be dismissed insofar as it alleges the commission of unfair labor practices other than those found in this Decision.

On the basis of the above findings of fact and conclusions of law, it is hereby recommended that the objections filed by the Union to the April 14, 1966, election be sustained, and that the results of the election be set aside. It is further recommended that the Regional Director hold a new election when in his opinion the effects of the unfair labor practices found shall have been dissipated.

Dated at Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT tell our employees that they should conceal their union activities, tell them that the Company is aware of the identity of prounion employees, or tell our employees that they may lawfully be discharged for engaging in strike action.
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the

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[9] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

exercise of their right to self-organization, to form, join, or assist any labor organization, to join Retail Clerks Union, Local No. 1552, Retail Clerks International Association, AFL-CIO, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, including strike action, or other mutual aid or protection, or to refrain from any or all such activities.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

DAYTON FOOD FAIR STORES, INC.

(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly wtih the Board's Regional Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio, 45202, Telephone 684-3686.

APPENDIX D – STATUTES

SECTION 7, NATIONAL LABOR RELATIONS ACT

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of

such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

SECTION 8 (a) (1), NATIONAL LABOR RELATIONS ACT

(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

SECTION 8 (c), NATIONAL LABOR RELATIONS ACT

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

SECTION 10 (c), NATIONAL LABOR RELATIONS ACT

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

UNITED STATES CONSTITUTION,

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."